Supreme Court, U.S.
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No.

In The

# Supreme Court of the United States

ROBERT DAISLEY and LEE KERSLAKE,

*Petitioners*,

v.

OZZY OSBOURNE, SHARON OSBOURNE, SONY MUSIC ENTERTAINMENT, INC., EPIC RECORDS, INC., BLIZZARD MUSIC LTD., and MONOWISE, LTD.

*Respondents*.

On Petition for Writ of Certiorari To The United States Court of Appeals for the Ninth Circuit

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

I. Whether Respondents can affect an involuntary transfer of the copyrights of Petitioners through a purported "repudiation" of the parties' mutual, open and current account relationship, in direct contravention of the established law of other circuits, the published decisions of the Ninth Circuit, and the United States Copyright Act.

II. Whether traditional notions of due process are satisfied when the district court dismisses a claim *sua sponte* without notice to Petitioners, and without consideration of material evidence already before it.

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## PETITION FOR WRIT OF CERTIORARI

Robert Daisley and Lee Kerslake, the Petitioners, respectfully pray that a writ of certiorari issue to review the opinion and orders of the United States Court of Appeals for the Ninth Circuit, entered in this case on October 17, 2003 and December 2, 2003, respectively.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (App. A hereto), which is sought hereby to be reviewed, is unreported. The underlying opinion of the United States District Court for the Central District of California (App. B hereto) is unreported. The order of the Ninth Circuit denying the petition for rehearing and rehearing *en banc* (App. C hereto) is unreported.

## STATEMENT OF JURISDICTION

The order of the United States Court of Appeals for the Ninth Circuit (Appendix B) was entered on October 17, 2003. A timely petition for rehearing and rehearing *en banc* (Appendix F) was denied on December 2, 2003. The jurisdiction of the Supreme Court of the United States is invoked under Supreme Court Rule 10(a) in that the Ninth Circuit has: so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power; entered a decision in conflict with the decision of another United States court of appeals; and has decided an important issue in a way that conflicts with the accepted jurisprudence of the State of California.

## RELEVANT PROVISIONS INVOLVED

17 U.S.C. Section 201(e) of the United States Copyright Act provides in pertinent part:

"[N]o action by any governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to (an author's) copyright, or any of the exclusive rights under a copyright shall be given effect under this title."

Section 337(2) of the California Code of Civil Procedure provides:

> 2. An action to recover (1) upon a book account whether consisting of one or more entries; (2) upon an account stated based upon an account in writing, but the acknowledgment of the account stated need not be in writing; (3) a balance due upon a mutual, open and current account, the items of which are in writing; provided, however, that where an account stated is based upon an account of one item, the time shall begin to run from the date of said item, and where an account stated is based upon an account of more than one item, the time shall begin to run from the date of the last item.

## STATEMENT

### (i) Nature of the Case

This is a petition for review of the decisions of the United States District Court for the Central District of California and United States Court of Appeals for the Ninth Circuit finding that the copyrights of Petitioners are involuntarily transferred to Respondents. Despite the specific prohibitions of the United States Copyright Act and the established jurisprudence of every circuit, the Ninth Circuit perceived the effect of California Code of Civil Procedure § 337 to control the legal and beneficial ownership of the rights inherent in the copyrighted musical performances of Petitioners as embodied in the sound recordings sold by Respondents. Moreover, certain of Petitioners' claims were dismissed *sua sponte*, without notice and despite the existence of material evidence in the record that was overlooked by the District Court.

### (ii) Proceedings at the United States District Court

On August 25, 1998 Appellants filed a Complaint in the United States District Court for the Central District of California.

On February 19, 2002, Respondents filed a Motion for Summary Judgment and related documents. On March 14, 2002, Appellants filed their Opposition to Summary Judgment, together with related documents. On April 1, 2002, Respondents filed their Reply to Appellants' Opposition, and, finally, on April 8, 2002, Appellants filed the Supplemental Declaration of Mary Vitoria, Q.C. Oral argument was entertained on April 8, 2002. On June 4, 2002, the District Court prepared a Minute Order denying

Summary Judgment as to Appellants' claim for Open Book Account, but granting summary judgment as to Appellants' Lanham Act and Unfair Competition claims. This order was entered on June 7, 2002 (Appendix C).

On July 9, 2002, the District Court held a telephonic status conference regarding the possibility of Motions to Reconsider and set a briefing schedule. On or about July 19, 2002, both Appellants and Respondents filed their Motion for Reconsideration of the Summary Judgment Order. On July 24, 2002 Appellants filed Supplemental Declarations of Robert Daisley and Rosemary Hooke in Support of their Motion to Reconsider. On or about July 26, 2002, both Appellants and Respondents filed their Oppositions to the other Parties' respective Motions to Reconsider. On August 19, 2002, the District Court entered its Order Granting Respondents' Motion for Reconsideration of the Summary Judgment Order and Denying Appellants' Motion for Reconsideration of the Summary Judgment Order (Appendix D). On the same day, the District Court entered the final Judgment (Appendix E).

**(iii) Proceedings at the United States Court of Appeal for the Ninth Circuit**

On September 17, 2002, Appellants timely filed a Notice of Appeal. On January 24, 2003, Appellants timely filed their Opening Brief. On March 3, 2003, Respondents timely filed their Opposition Brief. On March 21, 2003, Appellants timely filed their Reply Brief. On October 8, 2003, the Ninth Circuit entertained oral argument. On October 17, 2003, the Ninth Circuit issued its Memorandum of Decision (Appendix A) and, on the same day, entered the accompanying Order (Appendix B). On October 31, 2003, Appellants timely filed their Petition for Rehearing and for

Rehearing *En Banc*. This petition was denied on December 2, 2003 (Appendix F).

**(iv) Statement of Facts**

Petitioners Robert Daisley and Lee Kerslake are rock-and-roll musicians of international renown. They are both songwriters and performers. During the course of their careers, the albums on which their work appears have sold in excess of forty million (40,000,000) copies. In or about early 1980, Messrs. Daisley and Kerslake joined together with Ozzy Osbourne and Randy Rhoads to form a band originally known as the "Blizzard of Ozz" ("Band").

The Band set about writing, rehearsing and recording songs at Ridge Farm Studios in Dorking, England ("Ridge Farm"), without the benefit of written agreements, either amongst the members of the Band, or with the Band's record company, Jet Records. Except, however, Mr. Osbourne entered into a recording contract, as Monowise, with Jet Records/Jet Holdings, Inc., in or about November 1980. This contract specifically established an account concerning all royalties generated by exploitation of the albums "Blizzard of Ozz" and "Diary of a Madman" for the benefit of Mssrs. Daisley and Kerslake.

Mr. Daisley wrote the lyrics and music for eight (8) songs together with the other members of the Band. Similarly, Mr. Daisley performed each of these songs, plus a ninth (9th) instrumental song, for recording purposes with the other members of the Band. Mr. Daisley also served as a producer. Upon completion, in or about late July 1980, these songs were recorded, and comprised, a complete album, the self-titled debut "Blizzard of Ozz" ("Blizzard Album").

Likewise, Mr. Kerslake contributed to the lyrics and wrote the music for one (1) song together with the other members of the Band. Similarly, Mr. Kerslake performed all nine (9) songs for recording purposes with the other members of the band. Mr. Kerslake also served as a producer.

Upon completion and initial release of the Blizzard Album, the Band embarked on a United Kingdom tour. The Band performed approximately twenty-five (25) dates during a span of approximately six (6) weeks. The Blizzard Album became a huge success and has sold many millions of copies throughout the world. It is currently released by Epic Records and distributed by Sony Music.

Thereafter, in or about November 1980, the Band began writing, rehearsing and recording songs for its second album, ultimately entitled "Diary of a Madman" ("Madman Album"). As before, these sessions were recorded at Ridge Farm. Mr. Daisley wrote the music and lyrics for each of the eight (8) songs on the Madman Album together with the other members of the Band. Similarly, Mr. Daisley performed each of these songs for recording purposes with the other members of the Band. Mr. Kerslake contributed to the lyrics and wrote the music for six (6) songs together with the other members of the Band. Similarly, Mr. Kerslake performed each song for recording purposes with the other members of the band. Mr. Daisley and Mr. Kerslake also acted as producers on the Madman Album. Like "Blizzard of Ozz", "Diary of a Madman" was also a success. It has sold many millions of copies throughout the world and is currently released by Epic Records and distributed by Sony Music.

More recently, in or about 1998, Respondents released a compilation album entitled "The Ozzman Cometh"

("Ozzman Album") which contains certain compositions and performances that first appeared on the Blizzard and Madman Albums. The Ozzman Album is currently released by Epic Records and distributed by Sony Music.

Despite their contributions, Messrs. Daisley and Kerslake are not being paid the record royalties to which they are entitled. Moreover, they have not been afforded the performance and production credits to which they are entitled on the Madman and Ozzman Albums. Additionally, Respondents have exploited Appellants' music, lyrics and performances in a variety of other media from 1980 to the present. Their music is literally everywhere. For example, the song "Crazy Train" is regularly featured in television commercials and broadcast nationally on NFL games. Also, certain compositions and/or performances have been released in other recorded formats, including but not limited to, compilation albums, live recordings and singles. The credit and payment deficiencies of which Appellants complained also apply to these ancillary exploitations.

Now, the decision of the Ninth Circuit strips them of any ownership interest in their own copyrights by ruling that Petitioners will never henceforth be entitled to receive royalties from the commercial exploitation of their musical performances. Rather, that ownership interest was awarded to Respondents in what seems to be a novel, and unexpected, extension of the adverse possession doctrine. The Copyright Act expressly forbids such a taking, as does the law of every circuit.

**(v) Statement of Court of Appeals and Supreme Court Jurisdiction**

This matter was originally filed in the United States District Court on August 25, 1998. The District Court had jurisdiction under 15 U.S.C. §1121, 17 U.S.C. §501, 28 U.S.C. §1331, and 28 U.S.C. §1338(a). The Order Granting Respondents' Motion for Summary Judgment In Part was entered on June 7, 2002. The Order Granting Respondents' Motion for Reconsideration of Summary Judgment Order and the Order Denying Appellants' Motion for Reconsideration of Summary Judgment Order was entered on August 16, 2002, as was the final Judgment. The United States Court of Appeals for the Ninth Circuit had jurisdiction over the appeal from the final order and judgment granting summary judgment to Respondents against Appellants, under 28 U.S.C. §1291.

The jurisdiction of this Court on application for writ of certiorari is invoked under U.S. Supreme Court Rule 10(a) as set forth above. That is, the instant petition presents substantial questions in that the Ninth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power, and entered a decision in conflict with the decision of other United States courts of appeals, and, indeed, in conflict with the accepted jurisprudence of the Ninth Circuit itself. There are two fundamental issues. First, the Ninth Circuit misapprehended the fundamental nature of mutual, open and current accounts by creating new law – namely that a "repudiation" of the existence of an account operates to close it, despite continuing commercial activity. This new point of law extinguishes Petitioners' ownership interest in their own copyrights, thereby creating an intra-circuit conflict of authority, and directly contradicting the

United States Copyright Act. Second, the Ninth Circuit misapprehended the law by ruling that due process does not mandate that a trial court have intimate familiarity with the record when it dismisses a claim *sua sponte*. It was improper for the district court to shift that burden to Petitioners without adequate notice that it intended to address those claims that were the subject of the *sua sponte* motion.

The consequences of this ruling are both serious and far-reaching. On the one hand, the Ninth Circuit has created a mechanism for the involuntary transfer of copyrights through a form of adverse possession that conflicts directly with the United States Copyright Act and the established jurisprudence of every circuit. On the other, the Ninth Circuit has tacitly conveyed upon the district court power to dismiss claims *sua sponte,* despite the presence of supporting material evidence in the record. As long as the district court is unaware of its own record, its power in this regard is unchecked.

## REASONS FOR GRANTING THE WRIT

### I. Ruling that "Repudiation" Closes a Commercial Account Despite Continuing Commercial Activity, Creates a Conflict in Circuit Authority and Violates the Copyright Act.

Ignoring the nature of the commercial relationship between the parties, the Ninth Circuit ruled that Petitioners' claims accrued when the Respondents refused to make any further payments against the mutual, open and current record royalty accounts. This holding represents a dramatic departure from established account law and creates not only a conflict with the established federal law of this circuit, but also contradicts the laws of the State of California, thereby violating the doctrine of separation of powers.

Assuming for purposes of its ruling that an account relationship existed, the Ninth Circuit expressed concern over an evisceration of the statute of limitations defense when it stated: "This is true notwithstanding Daisley and Kerslake's contention that an open book account never closes as long as debts are accumulating, for otherwise the period of limitations would never expire." The Ninth Circuit adopted the position of Respondents and suggested, instead, that a "repudiation" of the right to receive payment acts to trigger the statute. For this proposition, the Court cited the federal case of *Cusano v. Klein*, 264 F.3d 936, 947-48 (9th Cir. 2001) and the California state case of *R.N.C., Inc. v. Tsegeletos*, 231 Cal.App.3d 967, 972-73 (1991).

In citing these cases, the Ninth Circuit misapprehended their holdings. Repudiation is a contract defense. It is not a defense to an account claim. There is

absolutely no authority to suggest that "repudiation" serves to close an account in the face of continuing commercial activity. Once an account is closed, and a good faith balance is struck, then the open account becomes stated and the refusal to pay that balance, good faith or otherwise, causes the claim to accrue. The Ninth Circuit cited *Cusano* to support its ruling that Sharon Osbourne's repudiations terminated the account upon which Petitioners' suit is based. However, the only portions of *Cusano* that are pertinent to a refusal to pay, or "repudiation" are *dicta*. It is merely in passing that the *Cusano* court remarks:

> Cusano's alleged open book account with Defendants has been open for years, and could continue to remain open for years to come. Cusano cannot avoid disclosing on his bankruptcy schedules a claim for an unpaid royalties balance, which was ascertainable and collectible when he filed his petition, simply because this claim does not accrue for statue of limitations purposes until the royalties dry up or payment is refused. Thus, if there was any outstanding balance due Cusano on the open book account when he filed for bankruptcy, he was under a duty to schedule it as a receivable or as a cause of action for unpaid royalties."

*Cusano*, 264 F.3d at 947-948 (emphasis added).

The refusal of payment which the *Cusano* Court references is the refusal to pay the outstanding balance due on the royalty account – a balance which must be rendered in good faith. *R.N.C.*, 231 Cal.App.3d at 972. This is fundamentally different from the instant situation where no balance was struck, good faith or otherwise. Rather, there

were only threats accompanied by an outright rejection of the notion that an account even existed. Unlike *Cusano*, the royalties didn't "dry up". Record sales continue to this day and royalties are being earned. The above quote, when placed in its proper context, is actually consistent with the entire body of account law. It is the refusal to pay a properly rendered balance that triggers the statute, not a "repudiation" of the very existence of the account. As noted above, the concept of repudiation is foreign to the principles upon which account law is based. The District Court's misapplication of the judicial asides in *Cusano* is insufficient to overwhelm the well-established law of accounts.

An account can only be closed by three mechanisms: 1) the account creditor ceases to extend further credit;[1] 2) the account becomes stated upon agreement of the parties to the account;[2] and/or 3) the account is liquidated by the execution of a note or other written evidence of the balance owing by all parties to the account.[3] Only the creditor may unilaterally close the account and that did not occur in this case.

Respondents appeared to argue that two statements made by Sharon Osbourne in 1986 and 1991 purported to render a balance and thereby closed the account, triggering the four-year statute of limitations. Even if it was possible to equate either statement with the rendering of an account balance, Sharon's arbitrary, inaccurate and bad faith assertion that the account balance is zero would not operate to close

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[1] *R.N.C., Inc. v. Tsegeletos*, 231 Cal.App.3d 967, 972 (1991).

[2] *Norton v. Larco*, 30 Cal.126 (1866); *Auzerais v. Nagle*, 74 Cal. 60 (1887); *Gardner v. Watson*, 170 Cal. 570 (1915); *See also* Cal.Jur.3d §2 (2001).

[3] *Ellison v. Henion*, 183 Cal. 171 (1920).

the account. Not only must account balances be struck between the parties in good faith, but also, where the debtor maintains the account, the debtor cannot rely on its own errors to the detriment of the creditor and cannot benefit from its own failure to make proper entries. In such event, the creditor can go back and challenge entries from the beginning of the account per *Moss v. Underwriter's Report, Inc.*, 12 Cal.2d 266, 271 (1938), and *Maggio, Inc. v. Neal*, 196 Cal.App.3d 745, 753 (1987).

Likewise, the California state court case *R.N.C.* does not support the proposition for which the Ninth Circuit cites it. Instead, like all of the account cases, it supports Appellants' position. Respondents originally cited this case for the proposition that "a book account is deemed closed, 'when the debtor declined to pay the full amount as it became due,' or at the latest when Petitioner 'demanded payment in full' and was rebuffed." What *R.N.C.* actually holds is that "When no further credit was extended, the 'open' character of the account ended." *R.N.C.*, 231 Cal.App.3d at 973. The termination of the commercial relationship closed the account. In fact, *R.N.C.* is very instructive on the issue stating on page 972 that:

> [A] book account like any open account becomes closed once the account creditor ceases to extend credit and there will be no further activity on the account other than the payments by a creditor toward the settled debt. "While an 'open' book account has been defined as '"[a]n account with one or more items unsettled,"' it also includes '"an account with dealings still continuing."' (*Mercantile Trust Co. v. Doe*, (1914) 26 Cal. App. 246, 253 [146 P. 692].) By contrast, a 'closed'

> account is, according to Black's Law Dictionary, one 'to which no further additions can be made on either side....' Thus, it is clear that the 'open' or 'closed' nature of a book account turns not on the account balance per se, but on the parties' expectations of possible future transactions between them [on that account].' (*Gross v. Recabaren*, (1988) 206 Cal. App. 3d 771, 778 [253 Cal.Rptr. 820].)".

*R.N.C.*, 231 Cal.App.3d at 972.

*R.N.C.* actually puts to rest the issue of whether a bad faith "repudiation" by Sharon Osbourne could close the account. It cannot. On page 972, *R.N.C.* states:

> [Once formed]...the account shall be kept open and subject to a shifting balance as additional related entries of debits and credits are made, until it shall suit the convenience of either party to settle and close the account, and where, pursuant to the original express or implied intention, there is but one single and indivisible liability arising from such series of related and reciprocal debits and credits. This single liability is to be fixed on the one part or the other, as the balance shall indicate at the time of settlement, or following the last pertinent entry of the account, and it must be one mutually agreed upon between the parties or impliedly imposed upon them by law."

*R.N.C.*, 231 Cal.App.3d at 973 (emphasis added).

Given the continuing commercial relationship, the continued extension of credit by Daisley and Kerslake

through the Osbourne's continued use of their performances on the master recordings, the continued record sales, the continued account entries, and the continued payments to Daisley and Kerslake, the account remains open.

Both federal and state law mandate an account remains open until the commercial activity comprising the account relationship ceases. Moreover, in the Ninth Circuit, the statute of limitations does not run on each individual entry, but on the account as a whole. Thus, a Petitioner may challenge entries and recover damages dating back to the creation of the account. *Sinatra v. Columbia Records*, USDC (Central District) 65-1647 (1971)[4] is instructive. In that case, Frank Sinatra brought an account action in 1965, seeking royalties going back to 1943. The court held, properly, that he was entitled to do so as long as the account remained open. Like Monowise, Columbia kept all of the records and claimed that no sums were due. Like Petitioners, Sinatra sought to challenge the accuracy of the account and to recover accordingly. The District Court held unequivocally "[i]f Columbia wants to rely on the balance it shows in its books of account, it must prove the accuracy of that balance". *Sinatra*, USDC (Central District) 65-1647 at 5. In the present dispute, Respondents bore a similar, factual burden – one that they have not even attempted to meet. Like Columbia, Respondents cannot simply maintain that no amount is due. It is a matter of proof for the trial court.

In *Sinatra*, the court ruled:

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[4] Though unpublished, the case was cited pursuant to Circuit Rule 36-3(b), which allows citation of unpublished dispositions in a petition for a rehearing en banc to demonstrate the existence of a circuit conflict.

> I find that Sinatra's action on the open book account is not time barred under the California statute of limitations. I also find that Sinatra is entitled to show the correct amount due him on the items listed in Columbia's book account and that Sinatra is not required to accept the accuracy of the amounts credited by Columbia for such items.

*Sinatra*, USDC (Central District) 65-1647 at 5.

In the instant case, both the District Court and the Ninth Circuit assumed that the mutual, open and current account between the parties was open. Given that a repudiation cannot act to close the account in the face of continuing commercial activity, Petitioners should, like Frank Sinatra, be able to challenge the sufficiency of the entries until the last time a balance was settled in good faith, namely June 30, 1983. To rule otherwise is to cause an unacceptable split of authority both within this circuit, and with the laws of the State of California.

As this Court has held, "State courts are the principle expositors of state law." *Moore v. Sims*, 442 U.S. 415, 429 (1979). As detailed above, the California courts have expressly enumerated only three mechanisms for closing an account. However, the Ninth Circuit has now created a fourth mechanism. This is contrary in principle to "[t]he Supreme Court holding that a federal court sitting in diversity must follow an intermediate state court decision unless other persuasive authority convinces the federal court that the state supreme court would decide otherwise." *Richardson v. United States*, 841 F.2d 993, 996 (9th Cir. 1998) (citing *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 236-237 (1940); *accord*, *Stoner v. New York Life Ins. Co.*, 311 U.S. 464, 467 (1940). Moreover, this newly forged law has created not only

an intra-circuit conflict of authority, but has violated the constitutional doctrine of separation of powers by running roughshod over established state law.

There is no danger of the statute of limitations running indefinitely. Like the existence of the open account itself, the statute is defined by the underlying commercial relationship. As long as Respondents continue to sell Petitioners' music, the account remains open. When that commercial activity stops, or when a balance is mutually agreed upon as to a particular portion of the account - and only then - does the fiduciary duty to account cease, and the statute begin to run.

Apart from allowing Respondents to be unjustly enriched, the true effect of the Ninth Circuit ruling is to violate Section 201 (e) the United States Copyright Act, as affirmed by all other circuits, and, indeed, by the published decisions of the Ninth Circuit itself. The Ninth Circuit has, *de facto*, transferred the copyrights of Petitioners involuntarily. Section 201(a) of the Copyright Act provides unequivocally that statutory copyright "vests initially in the author or authors or the work." In this case, the copyrights in their own musical performances vested in Petitioners. That interest was never assigned, hypothecated or transferred to Respondents, or anyone else. Inherent in Petitioners' ownership interest are the exclusive rights of an author set forth in Section 106 of the Copyright Act, including the right to reproduce the copyrighted work in copies or phonorecords. Further, Section 501 confers standing to sue upon the "legal or beneficial owner of an exclusive right (under the Copyright Act)."

In this case, however, the Ninth Circuit has ruled that Petitioners may not sue to recover royalties for the

reproduction and commercial sale of their copyrights. It has not limited their right in terms of time, territory, medium, or any other fashion. Rather, it has conferred upon Respondents the exclusive right to reproduce these performances and to receive proceeds therefrom. Petitioners are thereby deprived of their ownership interest in their own copyrights. If Petitioners, as the original authors of the performances, are vested with ownership, albeit joint, in the sound recordings, and those interests were never transferred, then they belong to Petitioners. The Ninth Circuit has taken their property rights and awarded them to Respondents. It cannot do this, at least not without violating the United States Copyright Act and the jurisprudence of every circuit. Section 201(e) of the Copyright Act provides unequivocally "no action by any governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to (an author's) copyright, or any of the exclusive rights under a copyright shall be given effect under this title." That is exactly what the Ninth Circuit did, and that is precisely why the decision is wrong. One would expect the passage of time to limit Petitioners' right to recover monetary damages. One would never expect the Ninth Circuit to allow involuntary transfer of copyrights through what is, in effect, adverse possession.

## II. The *Sua Sponte* Dismissal of Petitioner's Credit Claims Was an Abuse of Discretion and Violated Fundamental Principles of Due Process.

The Ninth Circuit misunderstood the issue regarding Petitioners' credits and did not even address the issue in its ruling. The fundamental issue before the Court was whether the Petitioners were granted a reasonable opportunity to present evidence of their claim, and, as a corollary, whether

the denial by the District Court of Plaintiffs' Motion to Reconsider was an abuse of discretion.

The Ninth Circuit devoted only fourteen lines to its consideration of Petitioner's claim that they were not given credit for writing, performing and producing on tens of millions of records. The Ninth Circuit was correct in its thinking that the District Court may rule *sua sponte* without notice to Petitioners. That was not the issue. Likewise, the Ninth Circuit was correct to cite the general proposition that it should not be required to hunt through the record for evidence. That is the job of counsel.

However, in order to satisfy the most basic due process concerns, the parties must be afforded a reasonable opportunity to present evidence of their claims. The District Court denied Petitioners that opportunity. Later, the Ninth Circuit ruled that Daisley and Kerslake "pointed to no substantial evidence that they were denied credit to which they were entitled." Two issues are posed: 1) Were Daisley and Kerslake entitled to credit?; and 2) Were they denied these credits?

Regarding the former, it is undisputed Daisley and Kerslake wrote, performed and produced on the albums and that they should, therefore, have received the customary credits. The specific nature of these credits, e.g. "Written by Bob Daisley", is set forth time and again in the record. The Respondents concurred, and even agreed to correct the credits during the pendancy of this litigation, such that the credits on future editions of these classic records would be accurate and in accordance with Petitioner's prayer. Clearly Daisley and Kerslake were entitled to credit. That fact is not in dispute.

Similarly, it is beyond dispute that Petitioners were denied credit. First, the liner notes[5] for the records clearly set forth the improper and/or joke credits referenced in each version of the complaint, and indeed in the earlier U.K. litigation. Those specific records, at least, bear improper credits, and as stated by Petitioners and their counsel on repeated occasion, there are many other, as yet undetermined, editions of these recordings that bear improper credits. Nonetheless, both the Ninth Circuit and the District Court seemed to focus on the fact that Respondents could not specify all such other editions.

Apart from the fact that any example of improper credits renders the *sua sponte* summary judgment ruling improper, the course of events before the District Court renders the dismissal of this claim not only erroneous, but also violative of basic due process standards. Consider that Petitioners sought from Respondents, through the most basic discovery requests, a statement of all editions of the recordings containing improper credits. Respondents objected to this request claiming it was burdensome and oppressive. Petitioners filed a Motion to Compel. The Magistrate Judge ordered the motion off calendar pending a summary judgment motion on unrelated grounds that did not even purport to address the credit claims. Although such a summary judgment motion was brought, the District Court dismissed the credit claims *sua sponte*, effectively penalizing the Petitioners for failing to cite the evidence that Respondents refused to provide. When, in their Motion to Reconsider, Petitioners did point to certain specific evidence in the record of improper credits, the District Court denied that motion claiming it need not consider such evidence in

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[5] These liner notes were attached as an exhibit to the original complaint and were furnished again to the District Court, upon its request, prior to its summary judgment ruling.

the context of a Motion to Reconsider, as the evidence referenced was previously in the possession of Petitioners. While the District Court normally need not, as the Ninth Circuit illustrated through porcine analogy, snuffle through the entire record for evidentiary truffles, if the District Court is to dismiss a claim *sua sponte*, it is incumbent upon the District Court to be familiar with that record. If, through its own oversight, it does not find the treasure buried beneath its very nose, it is an abuse of discretion to refuse to consider the evidence when Petitioner points to its location. While the discovery of new or different evidence is one possible ground for granting a Motion to Reconsider, the oversight of the District Court is another. That was the basis for Petitioner's motion, yet the District Court denied the motion, relying, improperly, on the prior theory.

In this context, the conduct of the District Court was an abuse of discretion and served to deny Petitioners' due process of law. When identifying which procedures constitute due process, courts look to those "which have traditionally been associated with judicial process" *Hannah v. Larche*, 363 U.S. 420, 442 (1960). The judge's review of evidence properly put before the court is so associated. Additionally, the "function of legal process is to minimize the risk of erroneous decisions" *Addington v. Texas*, 441 U.S. 418, 425 (1979). Refusal to review the evidence did not minimize, but rather increased, the risk of erroneous decisions, and thus, in these circumstances, violated the due process rights of Daisley and Kerslake.

## CONCLUSION

Petitioners respectfully submit that the Ninth Circuit erred in the following respects:

- By eliminating Petitioners' right to receive royalties from their copyrights, and by conferring upon Respondents the unfettered right to reproduce and distribute Petitioners' copyrighted musical performances, the Ninth Circuit has effected an involuntary transfer of copyright from the original authors in violation of the Copyright Act and the established law of every circuit.

- The Ninth Circuit has offended traditional notions of due process by validating the *sua sponte* dismissal of Petitioners' claims without notice to Petitioners and despite the existence of material evidence in the admittedly voluminous record.

Therefore, Petitioners respectfully pray that this Court grant this petition for writ of certiorari, reverse the decisions of the Ninth Circuit Court of Appeals and the United States District Court, return Petitioners' copyrights to them, require that Respondents account, pay and provide accurate credit for their commercial exploitation of Petitioners' musical compositions and sound recordings, and for all other just and proper relief.

Respectfully submitted,
Nate G. Kraut
*Counsel of Record*
Thomas A. Brackey II

FILED
OCT 17 2003
CATHY A. CATTERSON, CLERK
U.S COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

# UNITED STATES COURT OF APPEALS

# FOR THE NINTH CIRCUIT

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|---|---|
| ROBERT DAISLEY; et al.,<br><br>Plaintiffs - Appellants,<br><br>v.<br><br>OZZY OSBOURNE; et al.,<br><br>Defendants - Appellees. | Case No. 02-56624<br><br>D.C. No. CV-98-06954-CAS<br><br>MEMORANDUM |

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court
for the Central District of California
Christina A. Snyder, District Court Judge, Presiding

Argued and Submitted October 8, 2003
Pasadena, California

Before: RYMER and TALLMAN, Circuit Judges, and LEIGHTON,** District Judge.

Robert Daisley and Lee Kerslake appeal summary judgment in favor of Ozzy Osbourne and others related to him, as well as the district court's refusal to reconsider its ruling. Two claims remain at issue, for improper credit and for royalties based on an open book account. We affirm.

I

Whether or not an open book account was ever created, Daisley and Kerslake knew after settlement of the United Kingdom litigation in 1986 that they were not receiving royalties. They were told in July 1986 by Sharon Osbourne (who they knew spoke for the relevant entities) that the UK litigation and Daisley's buy-out agreement settled the matter, that they were not entitled to record royalties, and that they were not being paid and never would be. This was confirmed after a call to Osbourne's English accountant in August 1991. So, no later than August 1991, at the outside, Daisley and Kerslake were aware that the royalties to which they believed they were entitled had dried up and that payment had been refused. That is when their claim accrued (assuming an open book account existed), and the statute of limitations began to run. *See Cusano v. Klein*, 264 F.3d 936,

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** Honorable Ronald B. Leighton, United States District Judge for the Western District of Washington, sitting by designation.

947-48 (9th Circuit); *R.N.C., Inc. v. Tsegeletos*, 231 Cal. App. 3d 967, 972-73 (1991). This is true notwithstanding Daisley and Kerslake's contention that an open book account never closes as long as debts are accumulating, for otherwise the period of limitations would never expire. As this action was not filed until 1998, the open book account claim is barred, see Cal. Civ. Proc. Code § 337, unless fraudulent concealment tolled the statute of limitations.

It did not. The 1983 Monowise-Jet Agreement may have changed who owned the albums, but this cannot matter because Daisley and Kerslake failed to sue *anyone* – Osbourne, Jet *or* Monowise – in a timely fashion.

II

We need not decide if the district court should have given notice that it might look beyond the arguments set out in Osbourne's motion and grant summary judgment on the merits of the credit claim, as even on their motion to reconsider Daisley and Kerslake did not complain about this and pointed to no substantial evidence that they were denied credit to which they were entitled. Their own declarations are conclusory. No specifics are given. The liner notes to which they refer (assuming that they were part of the record) are self-explanatory. There are no admissions beyond the fact that Daisley and Kerslake performed in, and helped write, songs on the recordings. Nor was the district court obliged to search through depositions to discern some factual support for the claims. *See Forsberg v. Pac. N.W. Bell Tel. Co.*, 840 F.2d 1409, 1418 (9th Cir. 2001); cf. *Entm't Research Group, Inc. v. Genesis Creative Group, Inc.*, 122 F.3d 1211, 1217 (9th Cir. 1997) ("Judges are not like pigs, hunting for truffles buried in briefs.") (internal quotation marks and citation omitted).

As we cannot say that the district court abused its discretion in denying reconsideration under Local Rule 7-18, and no genuine issue of fact in apparent despite four years of litigation and five amended complaints, summary judgment was appropriately entered.

AFFIRMED.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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NO. 02-56624
CT/AG#: CV-98-06954-CAS

ROBERT DAISLEY; LEE KERSLAKE, individuals

Plaintiffs – Appellants

v.

OZZY OSBOURNE; SHARON OSBOURNE, individuals; SONY MUSIC
ENTERTAINMENT, INC., a Delaware Corporation; EPIC RECORDS INC.,
a Delaware corporation; BLIZZARD MUSIC LTD., an entity of unknown origin; COLIN NEWMAN, an individual; MONOWISE LTD., a United Kingdom corporation

Defendants – Appellees

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APPEAL FROM the United States District Court for the Central District of California, Los Angeles.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the

Central District of California, Los Angeles and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered October 17, 2003

ENTERED
CLERK, U.S. DISTRICT COURT
JUNE – 7 2002
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA**

**MINUTE ORDER**

Case No.: CV 98-6954-CAS (SHx)
June 4, 2002

Title: ROBERT DAISLEY and LEE KERSLAKE v. OZZY OSBOURNE; SHARON OSBOURNE; SONY MUSIC ENTERTAINMENT, INC.; EPIC RECORDS; BLIZZARD MUSIC LTD.; MONOWISE LTD.; and Does 3 through 100, inclusive

PRESIDING: HONORABLE CHRISTINA A. SNYDER, U.S. DISTRICT JUDGE

Maynor Galvez,
Deputy Clerk

**PROCEEDINGS: DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**
(filed February 19, 2002)

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d).

## I. INTRODUCTION

This case arises out of a longstanding dispute between musicians Robert Daisley and Lee Kerslake ("plaintiffs") and singer Ozzy Osbourne ("Osbourne"), Osbourne's publishing company, Blizzard Music, Ltd. ("Blizzard"), and Osbourne's recording company, Monowise, Ltd. ("Monowise"), with respect to royalties and artistic credit in connection with the two rock-and-roll albums written, recorded, and released in 1980-81, "Blizzard of Ozz" and "Diary of a Madman" (the "Albums"). Defendants re-released the and in 1997 Osbourne released a compilation album entitled "The Ozzman cometh," containing certain compositions and performances which first appeared on the Albums.

The parties attempted to resolve their differences through litigation in the United Kingdom from 1981 to 1986 (the "U.K. litigation"); that litigation culminated in a 1986 settlement agreement.[1] Plaintiffs contend that the court-order lump sum payment of £135,000 by defendants in the U.K. litigation, predecessors-in-interest to defendants in this case, settled only plaintiffs' claims for royalties prior to June 30, 1983, and does not address the payment of record royalties after that date.[2] Plaintiffs further contend that developments in the last three years have shown that defendants have been defrauding them of royalties to which they are entitled, as

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[1] Plaintiffs in the U.K. litigation were the same as plaintiffs here; defendants in that proceeding were Jet Records Limited ("Jet Records"), Jet Holdings, Inc., and Don Arden, the then-President of Jet Records (and defendant Sharon Osbourne's father).

[2] Although the Consent Order in the U.K. litigation was entered on June 30, 1986, see Motion of Defendants for Summary Judgment ("Mot"), Ex. Q, plaintiffs argue that the Consent Order only applies to plaintiffs' claims for royalties through June 30, 1983, when Monowise acquired the rights to the recordings embodied on the Albums from Jet Records.

well as depriving them of artistic credit for their work on the Albums.

On January 2, 2002, plaintiffs filed a Fifth Amended Complaint ("FAC"), alleging claims for: (1) violation of the Lanham Act, 15 U.S.C. § 1125(a); (2) violation of Cal. Bus. & Prof. Code § 17200 et seq.; (3) constructive trust for open book accounts; (4) declaratory relief re: credit and open book account payments; (5) permanent injunction; (6) demand for accountings; and (7) open book account.[3] Plaintiffs' claim for open book account alleges that since July 1980, defendants have maintained an open book account crediting plaintiffs for record royalties[4] from the sale of the Albums, but has failed to pay plaintiffs the monies due. FAC ¶ 76. Plaintiffs' accounting claim alleges that Blizzard has paid some but not all of the royalties due to the Albums. Id. ¶ 71. Finally, plaintiffs assert claims under the Lanham Act and California unfair competition law, alleging that they did not receive proper credit on certain pressings of the Albums. Id. ¶¶ 48 – 56.

On February 19, 2002, defendants filed the instant motion for summary judgment on all plaintiffs' claims. The parties appeared before the Court on April 8, 2002, and the Court thereafter took the matter under submission.

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[3] Although the FAC alleges seven claims for relief, the claims seek relief for essentially three kinds of alleged wrongs: (1) a claim for open book account; (2) a claim for accounting; and (3) claims for false designation of origin and unfair competition.

[4] "Record royalties" are paid by a record company to a performing artist who has a recording agreement with that company and performs on record albums the company sells. By contrast, "publishing royalties" are paid by a music publishing company to a songwriter who writes a musical composition that is recorded on those albums. Mot. at fn. 4.

## II. BACKGROUND

In or about November 1980, plaintiffs began writing, rehearsing, and recording songs at Ridge Farm Studios in Dorking, England, together with Osbourne and now-deceased guitarist Randy Rhoads. FAC ¶ 18. These recordings were to embody the Albums, which were released in 1980 and 1981. Defendants' Statement of Uncontroverted Facts ("DSUF") ¶ 4. Plaintiffs allege that at the time the recordings were made, plaintiffs, Osbourne, and Rhoads comprised a band known as the "Blizzard of Ozz" ("the band").[5] FAC ¶ 17. Plaintiffs admit that they never signed artist agreements with Jet Records[6], a British label that plaintiffs allege represented the band, and that there were no written agreements entered into a recording contract with Jet Records for the Albums.[7] That contract contained the following provision:

[Monowise] hereby irrevocably authorizes and requests Jet to deduct from each of the royalty rates specified in Clause 7(2) above [describing the amount of royalties

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[5] In contrast, defendants state that Osbourne embarked on a solo career in 1979 after leaving the band Black Sabbath, and was a solo artist when the recordings at issue were made. DSUF ¶ 3; Sharon Osbourne Dec. ¶ 3. Defendants represent that Jet Records hired plaintiffs to perform on the Albums and to tour with Osbourne to promote the Albums. DSUF ¶ 7; Sharon Osbourne Dec. ¶ 4. The parties agree, however, that together with Osbourne and Rhoads, plaintiffs wrote various songs that are embodied on the Albums. DSUF ¶ 8; Sharon Osbourne Dec. ¶ 4.

[6] The record reflects that although plaintiffs and Jet Records entered into negotiations regarding recording agreements, ultimately neither plaintiff signed a contract with Jet Records. DSUF ¶ 33; see Opp. Mot., Ex. 11, 12, 13.

[7] In addition, Rhoads signed a separate recording agreement with Jet Records. Sharon Osbourne Dec. ¶ 5.

Osbourne is entitled to] a royalty of Four and one half percent (4 1/2%) and to pay such 4 1/2% royalty direct to the artist performing jointly with [Osbourne] as the Ozzy Osbourne Band conditioned upon such performance having taken place and the artists being entitled to such royalty.

Mot., Ex. O. ¶ 15. Plaintiffs allege that Osbourne concealed the existence of this contract until after the instant litigation was commenced. Plaintiffs' Response to Defendants' Separate Statement of Uncontroverted Facts ("PRDSUF") ¶ 47. Plaintiffs contend that the above clause requires Jet Records to pay record royalties to the other musicians who performed on the Albums, and that plaintiffs became entitled to such payments by performing on the Albums. Opp. Mot. at 6. Plaintiffs contend that Monowise assumed the obligation to pay record royalties to plaintiffs when it acquired the rights to the Albums from Jet Records in 1983. See FAC ¶¶ 18, 47. In response, defendants argue that the above clause merely authorized Jet Records to reduce the amount of record royalties paid to Osbourne in order to compensate musicians who performed on the Albums if Jet Records chose to do so, and ever elected to exercise this clause and agreed to pay plaintiffs record royalties. Mot. at 13.

In 1983, Monowise acquired the rights to the recordings embodied on the Albums from Jet Records. DSUF ¶ 5; Sharon Osbourne Dec. ¶ 3. The 1983 Jet Records-Monowise Agreement contains the following provision:

Monowise and Osbourne jointly and severally indemnify Jet for any claims, demands, debt, damages, liabilities, costs of defense (including reasonable attorneys' fees), actions, causes of action, suits and sums of money which Bob Daisley, Randy Rhoads and/or any executor or administrator

thereof, and Lee Kerslake shall hereafter make in connection with all phonographic records and tapes that CBS shall have paid and/or accounted to Monowise after June 30, 1983.

Opp. Mot., Ex. 15, ¶ 6(b). Plaintiffs argue that defendants concealed both Jet Records' sale of the Albums to Monowise, as well as the indemnification clause contained in the Jet Records-Monowise Agreement, until after the instant lawsuit was commenced. PRDSUF ¶¶ 46, 47.

In 1981, plaintiffs initiated the U.K. litigation, alleging that Jet Records had breached the recording agreements that plaintiffs had negotiated but not signed with Jet Records, by failing to pay record royalties to plaintiffs. DSUF ¶ 33; see Mot., Ex. P. Plaintiffs and Jet Records settled this litigation before a decision on the merits was reached, and the settlement terms were incorporated into a British Court Order dated June 30, 1986. DSUF ¶ 35; see Mot., Ex. Q. The settlement resolved plaintiffs' claims against Jet Records for a one-time payment of £35,000. DSUF ¶ 36; see Mot., Ex. Q.

In February 1986, while the U.K. litigation was still pending, Daisley, through his company, Valiantforce Limited, signed a release in favor of Osbourne and Monowise. See Mot., Ex. R (the "Daisley Buy-Out"). The bulk of the Daisley Buy-Out concerns the payment of £35,000 to Daisley for his writing contributions to Ozzy's album "The Ultimate Sin." However, the document also includes a paragraph releasing Osbourne and Monowise:

From all actions proceedings, costs, expenses, damages, claims, losses and demands whatsoever which they, Mr. Daisley and/or Valiantforce now have or but for the execution could or might have had against Monowise and/or

Mr. Osbourne or either of them for or in respect of any claim for monies allegedly due to Mr. Daisley by way of artists record royalties or otherwise in relation to sales since the 1st July 1983 of any and all versions of the master recordings [embodied on the Albums] . . . .

See id. ¶10. Plaintiffs claim that because the language in the release is limited to the past and present tenses, the parties did not intend to preclude Daisley from bringing future claims for record royalties. Opp. Mot. at 12. In response, defendants argue that the Daisley Buy-Out operates to release defendants from any potential claim for record royalties brought by Daisley. See Mot. at 18 – 19. The parties agree, however, that Kerslake is not reference in the Daisley Buy-Out, and it does not appear that Kerslake's claims for record royalties would be affected by the existence of this agreement. See also Sharon Osbourne Dec. 11 ("No buy-out agreement was executed with Kerslake because he had not remained in contact with either Ozzy or me in almost two decades. . . .")

Defendants state that in 1980 and 1981, plaintiffs executed Publishing Agreements with Blizzard transferring all of plaintiffs' rights as co-authors of the compositions on the Albums to Blizzard in exchange for future publishing royalties. DSUF ¶ 16; Sharon Osbourne Dec. ¶ 6. Since 1981, Blizzard has issued biannual accounting statements reflecting the payment of publishing royalties to plaintiffs. DSUF ¶ 20; see also Mot., Ex. W, X. Each Publishing Agreement contains a mandatory arbitration provision requiring that any dispute over publishing royalties be resolved by arbitration in the United Kingdom. DSUF ¶ 18; see also Mot., Ex. M, ¶ 18; Ex. N, ¶ 18. Plaintiffs dispute the authenticity of the Publishing Agreements proffered by defendants. Daisley declares that while he remembers

signing some sort of publishing agreement, he is sure that he did not sign the ones submitted by defendants. Daisley Dec. ¶ 7, 8. Kerslake denies ever signing any publishing agreements. Kerslake Dec. ¶¶ 13, 14.

## III. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate where "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party has the initial burden of identifying relevant portions of the record that demonstrate the absence of a fact or facts necessary for one or more essential elements of each cause of action upon which the moving party seeks judgment. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

If the moving party has sustained its burden, the nonmoving party must then identify specific facts, drawn from materials on file, that demonstrate that there is a dispute as to material facts on the elements that the moving party has contested. See Fed. R. Civ. P. 56 (c). The nonmoving party must not simply rely on the pleadings and must do more than make "conclusory allegations [in] an affidavit." Lujan v. National Wildlife Fed'n, 497 U.S. 871, 888 (1990). See also Celotex Corp., 477 U.S. at 324. Summary judgment must be granted for the moving party if the nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322. See also Abromson v. American Pacific Corp., 114 F.3d 898, 902 (9th Cir. 1997).

In light of the facts presented by the nonmoving party, along with any undisputed facts, the Court must decide whether the moving party is entitled to judgment as a matter of law. See T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 631 & n.3 (9th Cir. 1987). When deciding a motion for summary judgment, "the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (citation omitted); Valley Nat'l Bank of Ariz. v. A.E. Rouse & Co., 121 F.3d 1332, 1335 (9th Cir. 1997). Summary judgment for the moving party is proper when a rational trier of fact would not be able to find for the nonmoving party on the claims at issue. See Matsushita, 475 U.S. at 587.

## IV. DISCUSSION

### A. Plaintiffs' Claim for Open Book Account

Plaintiffs' claim for an open book account alleges that in approximately November 1980, Jet Records established an account for the payment to plaintiffs of record royalties derived from the exploitation of the Albums. FAC ¶ 18. Plaintiffs allege that since that time, Jet Records and/or its successor-in-interest, Monowise, have maintained an open book account reflecting royalties owed to plaintiffs, but have failed to pay plaintiffs the monies due. FAC ¶¶ 75-81/

As set forth above, plaintiffs contend that defendants intentionally concealed the existence of Osbourne's 1980 contract with Jet Records, pursuant to which Osbourne received record royalties for the Albums. PRDSUF ¶ 47. Plaintiffs argue that because under the terms of the contract, plaintiffs' royalties were derivative of the royalties paid to

Osbourne, defendants' concealment of the fact that Osbourne was receiving record royalties from the Albums effectively concealed from plaintiffs the fact that any royalties were due to plaintiffs.[8] At oral argument, counsel for plaintiffs stated that had plaintiffs known (1) that Osbourne was receiving record royalties from the Albums pursuant to the 1980 contract and (2) that a clause in that contract entitled them to a share to the royalties paid to Osbourne, plaintiffs would have taken earlier action to ensure that they were being paid appropriately. However, because defendants concealed these facts until recently, plaintiffs had no notice that they were not receiving all the royalties to which they were entitled.

Plaintiffs argue that defendants' bad faith concealment of the 1980 contract between Jet Records and Osbourne (1) tolls the statute of limitations on plaintiffs' claims and (2) estops defendants from relying on the absence of the elements required to establish an open book account. Opp. Mot. at 11 (citing Sears, Roebuck & Co. v. Blade, 139 Cal.App.2d 580 (1956) (fraudulent concealment of facts on which plaintiff's action are based, under proper circumstances, tolls the statute of limitations until plaintiff discovers or in the exercise of reasonable diligence should have discovered the facts); Moss v. Underwriters' Report, 12 Cal.2d 266 (one relying on a plea of estoppel must have been ignorant of the true state of facts and must have been intentionally misled to his injury by the act of the other).

In moving for summary judgment, defendants argue that plaintiffs' claim for open book account fails because: (1) plaintiffs cannot satisfy the statutory requirements for an

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[8] Plaintiffs argue that the indemnification provision contained in the 1983 Jet Records-Monowise contract is simply another indication that defendants were aware that plaintiffs were owed record royalties.

open book account under Cal. Code Civ. Pro. § 337a; (2) the parties' conduct confirms that no open book account existed; and (3) the instant litigation is barred by the doctrine of *res judicata* because plaintiffs asserted these same claims against Jet Records in the U.K. litigation in 1981. Mot. at 10 – 11.

First, defendants contend that plaintiffs cannot meet the requirements for a claim for open book account pursuant to Cal. Code Civ. P. § 337a, which requires a detailed statement that (1) arises out of a contract or fiduciary relationship which (2) shows the amount of debits and credits existing between the parties and (3) identifies the debtor and creditor.[9] See, e.g. Interstate Group Administrators, Inc. v. Cravens, Dargan & Co., 174 Cal.App.3d 700, 708 (1985). In response, plaintiffs argue that defendants' alleged fraudulent concealment of the 1980 contract between Jet Records and Osbourne, and the accounting record that would have resulted, estops defendants from now relying on the absence of the elements necessary to establish an open book account. In addition, plaintiffs state that rendering an account balance requires only an examination of the royalty statements rendered to Monowise. Opp. Mot. at 9. The Court finds that a triable issue of facts exists as to whether defendants' alleged fraudulent concealment of the record royalties owed to

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[9] Cal. Code Civ. P. 337a provides:
The term "book account" means a detailed statement which constitutes the principal record of one or more transactions between a debtor and a creditor arising out of a contract or some fiduciary relation, and shows the debits and credits in connection therewith, and against whom and in favor of whom entries are made, is entered in the regular course of business as conducted by such creditor or fiduciary, and is kept in a reasonably permanent form and manner and is (1) in a bound book, or (2) on a sheet or sheets fastened in a book or to backing but detachable therefrom, or (3) on a card or cards of a permanent character, or is kept in any other reasonably permanent form and manner.

plaintiffs estops defendants from relying on the absence of an open book account in order to defeat plaintiffs' claim.

Next, defendants contend that their conduct confirms that plaintiffs are not owed record royalties. Mot. at 17. Specifically, defendants contend that Sharon Osbourne repeatedly told plaintiffs that "defendants were not paying, and would never pay, record royalties to plaintiffs." Mot. at 18 (citing Daisley's deposition testimony); DSUF ¶¶ 38-43; Sharon Osbourne Dec. ¶¶ 12, 13, 14. However, Sharon Osbourne's statements to the effect that Osbourne and Monowise would not pay plaintiffs record royalties does not respond to plaintiffs' argument that they were not aware that record royalties were owed. Therefore, Sharon Osbourne's statements have no legal effect on plaintiffs' present claim for open book account.

Finally, defendants contend that plaintiffs' claims for open book account are barred by the doctrine of *res judicata* because these claims were "litigated and settled" by the U.K. litigation in 1986. Mot. at 19. Defendants submit two declarations from English Solicitor Laurence Gilmore, who states that plaintiffs' claims for record royalties were resolved by the 1986 settlement which was converted into a British Court Order. 2/2/02 Gilmore Dec. ¶¶ 11 – 17, 4/1/02 Gilmore Dec. ¶ 2. In response, plaintiffs contend that the 1986 Order does not operate as estoppel in favor of defendants, because (1) no actual decision on the merits was reached and (2) the Order does not operate against entities who were not parties to it, namely Ozzy Osbourne and Monowise. Opp. Mot. at 21 –24. Plaintiffs submit a declaration from Mary Vitoria, Queen's Counsel in the United Kingdom, concluding that under her interpretation of English law regarding *res judicata*, "none of the plaintiffs'

claims for payment of royalties by Monowise Ltd (and hence Ozzy Osbourne) would be barred. . . ." Vitoria Dec. ¶ 34.

Although the parties agree on the dispositive effect of claim preclusion and that, see Opp. Mot. at 24 and Reply at 14, plaintiffs argue that even assuming claim preclusion applies in this case, "it is subject to the qualification that special circumstances might allow otherwise." Opp Mot. at 24. Plaintiffs contend that because Osbourne had concealed his 1980 contract with Jet Records and Jet Records' 1983 sale of the rights to the Albums to Monowise, they were "reasonably unaware that they had any claims against Monowise during the U.K. litigation," and therefore cannot be precluded from bringing the claim in the present action. Opp. Mot. at 24 – 25.

Given the diametrically opposed declarations submitted by the parties, and the question of whether defendants' alleged fraudulent concealment precludes then from asserting claim preclusion as a basis for *res judicata*, the Court finds that a triable issue of fact exists as to whether the Order entered in the U.K. litigation bars plaintiffs' instant claim for open book account.

Because triable issues of fact exist as to whether (1) defendants' alleged fraudulent concealment estops them from relying on the absence of an open book account, and (2) *res judicata* bars plaintiffs' claims, the Court finds that summary judgment is inappropriate on plaintiffs' claim for an open book account.

B. Plaintiffs' Claim for Accounting

Plaintiffs allege that Blizzard has underpaid them an unspecified amount of publishing royalties due to them under

the Publishing Agreements entered into between plaintiffs and Blizzard in 1980 and 1981. FAC ¶¶ 69-74.

In moving for summary judgment, defendants argue that each Publishing Agreement contains a mandatory arbitration clause requiring that any dispute regarding the compositions must be resolved by arbitration in the United Kingdom. See Mot., Exs. M and N, ¶ 18 ("If any dispute or difference shall arise between the parties hereto on any matter touching this Agreement or any of the terms hereof the same and all matters arising therefrom shall be referred to a single Arbitrator to be agreed between the parties or in the case of failure to agree to be appointed by the President for the time being of the Law Society and the decision of such Arbitrator shall be final and binding on the parties hereto."). Defendant argues that because of this clause, this Court lacks jurisdiction to adjudicate plaintiffs' claim for an accounting of the publishing royalties. See Simula, Inc. v. Autoliv, Inc., 175 F.3d 716, 719 (9th Cir. 1999) ("[Arbitration] agreements are to rigorously enforced.")

In response, plaintiffs first argue that they should not be compelled to arbitrate their claims for publishing royalties because the Publishing Agreements are fraudulent, rendering the arbitration provision contained therein unenforceable. Opp. Mot. At 26-27. In addition to Daisley's testimony that he is sure that he did not sign the agreements submitted by defendants, Daisley Dec. ¶¶ 7, 8, and Kerslake's representation that he never signed any publishing agreements at all, Kerslake Dec. ¶¶ 13, 4, plaintiffs offer the following circumstantial evidence that the Publishing Agreements are fraudulent: (1) the agreements bear dates showing that they were executed before Blizzard existed as

an entity[10]; (2) they contain incorrect song titles based on lyrics that were not yet written[11]; and (3) plaintiffs received draft publishing agreements from Jet Records affiliate Aviation Music one month after the date of the Publishing Agreements proffered by defendants.[12] Opp. Mot. at 26-27.

Defendants argue that plaintiffs' allegation that the Publishing Agreements are fraudulent fails because: (1) several of the agreements were produced in discovery by plaintiff's own counsel, see Mot. at 9, fn. 8; and (2) plaintiffs testified at their depositions that they have no evidence or personal knowledge to support the claim that the Publishing Agreements are fraudulent. Id. (citing plaintiff's deposition testimony). Daisley admitted in his deposition that he "didn't know for sure" whether the documents were fraudulent, and conceded that they may have been back-dated. See Daisley Depo. 125: 25-126:12.

Next, plaintiffs argue that Blizzard has waived its right to compel arbitration by failing to raise the arbitration provision as an affirmative defense in its answer, or at any time in the four years since this action was commenced. Opp. Mot. at 28; see Britton v. Co-op Banking Group, 91 F.2d 1405, 1412 (9th Cir. 1990) (party waives right to arbitrate if it (1) was previously aware of existing right to arbitrate; (2)

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[10] Each Publishing Agreements bears either the date July 1, 1980, or February 1, 1981. Plaintiff provides documentation that Blizzard was incorporated on February 5, 1981. See Opp. Mot., Ex. 22.

[11] Plaintiffs contend that the band did not begin to write the music, titles, or lyrics for the compositions embodied on "Diary of a Madman" until they arrived at Ridge Farm Studios, and that the titles were derived from the lyrics. Opp. Mot. at 27.

[12] Plaintiffs proffer this draft, which they allege is dated August 4, 1980. Opp. Mot. at 27; see also Opp. Mot., Ex. 23. However, the Court was unable to locate any date on the document. The draft agreement does not contain a mandatory arbitration provision.

acted in a manner inconsistent with that right, and (3) prejudice to the party opposing arbitration resulted from inconsistent acts). Plaintiffs appear to contend that Blizzard first raised the existence of the mandatory arbitration clause in the instant motion for summary judgment. However, the record demonstrates that while Blizzard did not raise the arbitration provision as an affirmative defense in its answer to plaintiffs' fourth amended complaint, filed July 31, 2000 (Blizzard did not answer the second or third amended complaints), [13] defendants did in fact raise the issue in their first motion for summary judgment, filed October 18, 2000. See Defendants' Motion for Summary Judgment, filed October 18, 2000, at 20-21.Therefore, plaintiffs had notice of the purported arbitration clause no later than October 2000. As a result, plaintiffs' argument that they have "incurred substantial expenses over the past four years" in reliance on Blizzard's purported waiver of the arbitration clause, Opp. Mot. at 28, appear to be without support.

A party's failure to designate a mandatory arbitration clause in its answer is not sufficient absent a showing of prejudice, to establish waiver. Britton, 916 F.2d at 1413; Fisher v. A. G. Becker Paribas Inc., 791 F.2d 691, 698 (9th Cir. 1986) (holding that defendant's failure to raise arbitration clause as an affirmative defense in its answer did not waive right to compel arbitration because defendant did not act inconsistently with the contractual right to seek arbitration, and plaintiffs were not prejudiced by defendant's assertion of its right to compel arbitration more than three years after the action was filed.) In the instant case, plaintiffs have failed to provide any evidence that they suffered prejudice as a result of Blizzard's failure to raise arbitration

[13] Blizzard was not named as a defendant in this action until plaintiffs filed their second amended complaint on March 6, 1999.

clause between the time it was named as a defendant in March 1999, and defendants' first motion for summary judgment in October 2000. As a result, the Court finds that defendants have not waived their right to compel arbitration.

Therefore, the Court finds that plaintiffs' claims for an accounting of publishing royalties must be taken up before the appropriate arbitrator.

C. Plaintiff's Claims Under the Lanham Act and California Unfair Business Practices

Plaintiffs claim damages for false designation of origin pursuant to the Lanham Act, 15 U.S.C. § 1125(a), and seek an injunction under Cal. Bus. Prof. Code § 17200 et seq., alleging that they are not afforded the credits to which they are entitled on some versions of the Albums. FAC ¶¶ 32, 48-56. Defendants move for summary judgment on the basis that plaintiffs' claims limitations because plaintiffs have been aware of the allegedly improper credits since 1981. DSUF ¶ 44.

Although not clear from the FAC, it appears from their opposition motion that plaintiffs are not claiming that they received improper credit on the Albums when they were originally released in 1980-81, as defendants seem to understand, but that they have been improperly credited on some pressings of the Albums over the last two decades, and that they are not given proper credit on the "re-mastered" versions of the Albums released in the mid-1990s. See PRDSUF ¶¶ 49, 50; Daisley Dec. ¶ 27; Kerslake Dec. ¶ 22 ("[o]n certain pressings of [the Albums] we were given our proper performance credits, while on others we were not.") Specifically, each plaintiff declares that the credits are incorrect on the re-released Albums and on Ozzy's 1997

compilation album, "The Ozzman Cometh." Daisley Dec. ¶¶ 25, 26; Kerslake Dec. ¶¶ 21, 22. Plaintiffs do not specify in what way(s) the credits are incorrect.

The record is devoid of any evidence to support plaintiffs' claims. At oral argument, counsel for plaintiffs admitted that she did know on which versions of the Albums plaintiffs were improperly credited, and could not provide any evidence that plaintiffs were in fact improperly credited. Therefore, the Court finds that the plaintiffs have offered no evidence in support of their claims under the Lanham Act and California unfair competition law. Thus, summary judgment in favor of defendants is appropriate.

## V. CONCLUSION

For the foregoing reasons, defendants' motion for summary judgment is DENIED as to plaintiffs' claim for open book account and GRANTED as to plaintiffs' claims for accounting and pursuant to the Lanham Act and California Unfair Business Practices Act.

IT IS SO ORDERED.

FILED
CLERK, U.S. DISTRICT COURT
AUG 16 2002
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

ROBERT DAISLEY and
LEE KERSLAKE

Plaintiffs,

vs.

OZZY OSBOURNE et al.,

Defendants.

Case No: CV 98-6954
CAS (SHx)

ORDER GRANTING DEFENDANTS' MOTION FOR RECONSIDERATION OF SUMMARY JUDGMENT ORDER

ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION OF SUMMARY JUDGMENT ORDER

## I. INTRODUCTION

This case arises out of a longstanding dispute between musicians Robert Daisley and Lee Kerslake ("plaintiffs") and singer Ozzy Osbourne ("Osbourne"), Osbourne's publishing company, Blizzard Music, Ltd. ("Blizzard"), and Osbourne's recording company, Monowise, Ltd. ("Monowise"), with respect to royalties and artistic credit in connection with the two rock-and-roll albums written, recorded, and released in 1980-81, "Blizzard of Ozz" and "Diary of a Madman" (the "Albums"). Defendants re-released the and in 1997 Osbourne released a compilation album entitled "The Ozzman cometh," containing certain compositions and performances which first appeared on the Albums.

The parties attempted to resolve their differences through litigation in the United Kingdom from 1981 to 1986 (the "U.K. litigation"); that litigation culminated in a 1986 settlement agreement.[1] Plaintiffs contend that the court-order lump sum payment of £135,000 by defendants in the U.K. litigation, predecessors-in-interest to defendants in this case, settled only plaintiffs' claims for royalties prior to June 30, 1983, and does not address the payment of record royalties after that date.[2] Plaintiffs further contend that developments in the last three years have shown that defendants have been defrauding them of royalties to which they are entitled, as well as depriving them of artistic credit for their work on the Albums.

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[1] Plaintiffs in the U.K. litigation were the same as plaintiffs here; defendants in that proceeding were Jet Records Limited ("Jet Records"), Jet Holdings, Inc., and Don Arden, the then-President of Jet Records (and defendant Sharon Osbourne's father).

[2] Plaintiffs did not object to defendants' recharacterization of their claims in this manner.

On January 2, 2002, plaintiffs filed a Fifth Amended Complaint ("FAC"), alleging claims for: (1) violation of the Lanham Act, 15 U.S.C. § 1125(a); (2) violation of Cal. Bus. & Prof. Code § 17200 et seq.; (3) constructive trust for open book accounts; (4) declaratory relief re: credit and open book account payments; (5) permanent injunction; (6) demand for accountings; and (7) open book account. Plaintiffs' claim for open book account alleges that since July 1980, defendants have maintained an open book account crediting plaintiffs for record royalties from the sale of the Albums, but has failed to pay plaintiffs the monies due. FAC ¶ 76. Plaintiffs' accounting claim alleges that Blizzard has paid some but not all of the royalties due to the Albums. Id. ¶ 71. Finally, plaintiffs assert claims under the Lanham Act and California unfair competition law, alleging that they did not receive proper credit on certain pressings of the Albums. Id. ¶¶ 48 – 56.

On February 19, 2002, defendants moved for summary judgment as to all of plaintiffs' claims for relief. The parties appeared before the Court on April 8, 2002, and the Court thereafter took the matter under submission. On June 4, 2002, the Court issued an order (1) denying defendants' motion for summary judgment as to plaintiffs' claim for open book account and (2) granting defendants' motion for summary judgment as to plaintiffs' claims for accounting, and pursuant to the Lanham Act and California Unfair Business Practices Act (the "Order"). Both parties now move for reconsideration of plaintiffs' third, fourth, and seventh claims for relief, arguing that the Court failed to consider material facts in rendering its decision that there are no triable issues of fact as to plaintiffs' claims under the Lanham Act and California unfair competition law, and move for reconsideration of plaintiffs' first, second, and fifth claims for relief.

## II. STANDARD FOR RECONSIDERATION

Local Rule 7-18 sets forth the bases upon which this Court may reconsider a previous order. The Rule provides: A motion for reconsideration of the decision on any motion may be made only on the grounds of (a) material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision. No motion for reconsideration shall in any manner repeat any oral or written argument made in support of or in opposition to the original motion.

## II. DISCUSSION

A. Defendants' Motion for Reconsideration

In moving for summary judgment, defendants argued that plaintiffs' claim for open book account fails because: (1) plaintiffs cannot satisfy the statutory requirements set forth in Cal. Code Civ. Pro. § 337a for an open book account; (2) the parties' conduct confirms that no open book account existed; and (3) the instant litigation is barred by the doctrine of *res judicata* because plaintiffs asserted these same claims against Jet Records in the U.K. litigation in 1981. Motion of Defendants for Summary Judgment, at 10-11.

However, the Court denied defendants' motion as to plaintiffs' open book account claim based on plaintiffs' representations in declarations, briefs, and at oral argument,

that defendants fraudulently concealed the existence of Osbourne's 1980 contract with Jet Records pursuant to which Osbourne received record royalties for the Albums, and which contains a provision that plaintiffs allege entitles them to a share of the royalties paid to Osbourne. See Order at 7-10; see also Plaintiff's Response to Defendants' Separate Statement of Uncontroverted Facts ("PRDSUF") ¶ 47[3]; 3/14/02 Kerslake Dec. ¶ 7; 3/14/02 Daisley Dec. ¶ 11. Plaintiffs also maintain that defendants concealed the July 1, 1983 agreement pursuant to which Monowise acquired the right to the Albums from Jet Records, and which contains an indemnification clause pursuant to which Monowise and Osbourne assumed liability for all claims brought by plaintiffs and Randy Rhoads (another musician who performed on the Albums) arising out of their performances on the Albums. PRDSUF ¶¶ 46, 47; Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, Ex. 15. The Court held that a triable issue of fact exists as to whether defendants' alleged fraudulent conduct of the record royalties owed to plaintiffs (1) estops defendants from relying on the absence of an open book account in order to defeat plaintiffs' claim and (2) precludes defendants from asserting that plaintiffs' claim for open book account are barred by the order entered in the U.K. litigation. Order at 8-10.

Defendants now argue that reconsideration is warranted on the grounds that: (1) the Court overlooked facts demonstrating that plaintiffs were aware of the existence of the 1980 contract between Osbourne and Jet Records long before the commencement of the instant litigation – namely, that plaintiffs had produced that document from their own files in the course of discovery, see Defendants' Reply

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[3] In this paragraph, plaintiffs state: "Both the 1980 [] and the 1983[] agreements were concealed from Daisley and Kerslake until this lawsuit was commenced."

Memorandum in Support of Summary Judgment at 6 and Ex. O, and (2) counsel for plaintiffs admitted in a July 9, 2002 telephonic status conference held on the record with regard to the current motion for reconsideration that "[the 1980 contract] was, of course, in our clients' possession previously and was the basis on which they sued for royalties in the United Kingdom...." 7/9/02 Tr. 15:20-23; see also Tr. 16:18-20 (Counsel for plaintiffs: "[Defendants' counsel] is absolutely correct [] that we're not claiming the 1980 agreement was concealed...") Defendants contend that as a result, no genuine issues of material fact exist as to plaintiffs' claim for an open book account, because (1) plaintiffs were clearly on notice of their claims more than three years prior to their initiation of this action in 1998, and as a result their claims are barred by the statute of limitations, and (2) defendants are not estopped from asserting that plaintiffs have failed to demonstrate the statutory elements of an open book account claim and that *res judicata* bars plaintiffs' claim for open book account. Defendants' Motion for Reconsideration at 2.

In response, plaintiffs argue that the Court should not reconsider its denial of summary judgment, because despite plaintiffs' concession that the knew about the 1980 contract between Osbourne and Jet Records, material issues of fact remain. Plaintiffs contract between Jet Records and Monowise pursuant to which Monowise acquired the rights to the Albums. 7/9/02 Tr. 15:24-16:9 (Counsel for defendants: "The concealment occurred on July 1st, 1983 when Jet transferred its obligation to pay away to Monowise, which is [Osbourne's] company. This was concealed from our clients. Our clients didn't know who was responsible, if anyone, for paying their royalty and were unable to effectuate a claim against an unknown entity until this document was disclosed to them in discovery in this litigation."); see also Plaintiffs' Opposition to Defendants' Motion for Summary

Judgment at 9-11; PRDSUF ¶ 47. Thus, plaintiffs argue, "[t]he issue is not whether Plaintiffs knew they were entitled to artist royalties; but rather, who was obligated to maintain the account and pay the royalties." Plaintiff's Opposition to Motion for Reconsideration at 1. Plaintiffs appear to contend that although they knew that they had a potential claim for record royalties since the mid-1980s, they failed to sue because they did not know whom to name as the proper defendants. It was only when plaintiffs learned of the July 1, 1983 agreement between Jet Records and Monowise during the course of this litigation that they learned that Monowise owns the right to the Albums and is therefore the proper defendant for their claim for open book account.

However, even assuming, *arguendo*, that defendants concealed the existence of the July 1, 1983 agreement between Jet Records and Monowise, the record reflects that plaintiffs knew that they had a potential claim for record royalties for more than a decade before they initiated the instant action. This is evidenced by: (1) Daisley's testimony that he approached Sharon Osbourne in 1986 and again in 1991 regarding record royalties which he claimed were owed to plaintiffs, Defendant's Statement of Uncontroverted Facts ¶¶ 38, 39; (2) testimony by both plaintiffs that they were told by various individuals, including Sharon Osbourne and Don Arden, that they would receive record royalties for the Albums in 1979 and 1980, 3/14/02 Daisley Dec. ¶ 3 and 3/14/02 Kerslake Dec. ¶ 3; and (3) ledgers submitted by plaintiffs which allegedly document the payment of those royalties to them in 1979 through 1981, Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, Ex. 14.

Under California Law, the fraudulent concealment doctrine "does not come into play, whatever the lengths to which a defendant has gone to conceal the wrongs, if a plaintiff is on notice of a potential claim." Snapp &

Associates Ins. Services, Inc. v. Malcolm Bruce Burlingame Robertson, 96 Cal.App.4th 884, 890-91 (2002); see also Rita M. v. Roman Catholic Archbishop, 187 Cal. App. 3d 1453, 1460 (1986). Thus, plaintiffs' argument that their claim for open book account should be tolled by defendants' fraudulent concealment of Jet Records' 1983 sale of the Albums to Monowise, necessarily fails.

Pursuant to Cal. Code Civ. P. § 337, the four-year limitations period for an open book account accrues as of the last entry on that account. Cusano v. Klein, 264 F.3d 936, 947 (9th Cir.2001)("An action for open book account in California must commence within four years of the entry of the last item on the account.");R.N.C., Inc. v. Tsegeletos, 231 Cal. App. 3d 967, 971-72 (1991)(same). Thus, the statute of limitations on plaintiffs' claims began to run in 1981, the date of the last entry in the ledger submitted by plaintiffs which they purport documents the open book account, see Plaintiffs' Motion in Opposition to Summary Judgment at 9 and Ex. 14, and plaintiffs would have been required to initiate the instant action by 1985 in order for it to be timely. Plaintiffs' representation that the statute of limitation should be tolled by defendants' fraudulent concealment is without support. Once plaintiffs were aware that they had a potential claim for unpaid record royalties, they should have brought suit. The fact that they were unaware that Monowise rather that Jet Records is the proper defendant is irrelevant; plaintiffs could have sued Jet Records, who in turn would have named the proper defendant or sought indemnification from Monowise.[4]

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[4] Cal. Code Civ. P. § 474 allows a plaintiff to name "Doe" defendants in the complaint where their true identity is not known at the time of filing, and further allows amending of the complaint to show defendants' true names even after the statute of limitation has run.

Plaintiffs' July 9, 2002 admission that they knew of the 1980 contract between Osbourne and Jet Records from which plaintiffs allegedly derived royalties is contrary to the assertion made by plaintiffs in paragraph 47 of the PRDSUF, quoted above, in which plaintiffs assert that they were unaware of the existence of both the 1980 and 1983 agreements. Given this admission, which is directly contrary to the underlying premise of the Court's June 4, 2002 Order, the Court finds that there is no material issue of fact as to whether plaintiffs knew of the existence and terms of the 1980 contract, and that plaintiffs knew, or had reason to know, that they had a potential right to recover royalties. Accordingly, the Court hereby vacates its June 4 ,2002 Order denying defendants' motion as to plaintiffs' claim for open book account, and grants summary judgment in favor of defendants as to plaintiffs' claims based on an alleged open book account: "Constructive Trust for Open Book Account Proceeds"(third claim for relief); "Declaratory Relief re: Credits and Open Book Account Payments" (fourth claim for relief); and "Open Book Account"(seventh claim for relief).

B. Plaintiffs' Motion for Reconsideration

Plaintiffs move for reconsideration of the Court's grant of summary judgment as to plaintiffs' first claim for relief, for false designation of origin pursuant to the Lanham Act; second claim for relief, for unfair competition in violation of Cal Bus. & Prof. Code §17200 et seq.; and fifth claim for relief, for a permanent injunction prohibiting defendants from making or promoting Albums which do not properly credit them. Plaintiffs contend that they have been improperly credited on some pressings of the Albums over the last two decades, and that they are not given proper credit on the "re-mastered" versions of the Albums released in the mid-1990s. FAC ¶¶ 32, 48-56; Plaintiffs' Opposition to

Defendants' Motion for Summary Judgment at 29-30; PRDSUF ¶49. In the Order, the Court found that plaintiffs had failed to specify in what way(s) the credits were improper or to submit any evidence that they had in fact been improperly credited. Order at 13. In addition, at oral argument, counsel for plaintiffs admitted that he did not know on which versions of the Albums plaintiffs were improperly credited, and could not provide any evidence that plaintiffs were in fact improperly credited. Order at 13; 4/8/02 Tr. 23:6-14 (Court: "Which are the albums and which are the pressings that you contend your clients did not receive proper credit?" Counsel for Plaintiffs: "Your Honor, here is the problem. There have been so many different pressings with so many different versions we don't know where they have received proper credit and where they haven't")

In moving for reconsideration, plaintiffs argue that the Court failed to consider certain evidence, including: (1) plaintiffs' statement in their declarations that they were improperly credited on the Albums and on Osbourne's 1997 compilation album, "The Ozzman Cometh"; (2) copies of the Albums' liner notes showing such improper credits; (3) admissions from defendants acknowledging that plaintiffs were improperly credited on the Albums and on "The Ozzman Cometh" within three years of plaintiffs' initiation of this action. Plaintiffs' Motion for Reconsideration of Summary Judgment Order at 3. In addition, plaintiffs argue that the Court misconstrued the statement of plaintiffs' counsel, made at oral argument on April 8, 2002, that he did not know on which version of the Albums plaintiffs had been improperly credited. Order at 13. Counsel for plaintiffs states that "I do not believe I stated, and certainly did not intend to state, that I, and/or Plaintiffs were unaware of any particular pressings of the Improper Albums that bear improper credits . . . . I intended to convey that there are *so many* pressings of the albums at issue in this case that I, and Plaintiffs, while

aware of certain pressings with improper credits [], we are not aware of *all* the pressings bearing improper credits." Brackey Dec. ¶¶3-4. In addition, on July 24, 2002, Daisley submitted a declaration setting forth in detail the various ways in which he receives improper credits on "The Ozzman Cometh" and on the 1995 version of Diary of a Madman." 7/23/02 Daisley Dec. ¶¶ 3,5.

In response, defendants argue that the reconsideration is not appropriate, because plaintiffs fail to provide citations to any evidence in the record improper credits on the Albums or on "The Ozzman Cometh" that was before the Court on the motion for summary judgment. Defendants' Opposition to Plaintiffs' Motion for Reconsideration, at 2. First, defendants content that plaintiffs' conclusory declarations, which were before the Court on the motion for summary judgment, are insufficient because they contained no citations to any evidence of improper credits. Id. At 1; see 3/14/02 Daisley Dec. ¶ 27; 3/14/02 Kerslake Dec. ¶ 22; see Hansen v. United States, 7 F.3d 137, 138 ("When the nonmoving party relies only on its own affidavits to oppose summary judgment, it cannot rely on conclusory allegations unsupported by factual data to create an issue of material fact.") Next, defendants argue that copies of the Albums containing allegedly improper credits are not appended to the original complaint, and therefore not in the record in this case. In addition, defendants deny making any admission to the effect that they improperly credited plaintiffs. See Defendants' Answer to Plaintiffs' FAC ¶¶ 32, 34, 48-56 (denying allegations pertaining to improper credits). Defendants' Opposition to Plaintiffs' Motion for Reconsideration, at 1. Finally, defendants argue that none of the evidence Daisley refers to in his declaration, including the

Album liner, were in the record and before the Court on the motion for summary judgment.[5] Id. at 2.

Plaintiffs had numerous opportunities to detail their improper credit claims, including five amended complaints and a lengthy brief in opposition to defendants' motion for summary judgment. They failed to do so. The only evidence before the Court was plaintiffs' conclusory statements that they had been improperly credited.[6] When no factual showing is made in opposition to a motion for summary judgment, the district court is not required to search the record *sua sponte* for some genuine issues of material fact. Image Online Design, Inc. v. Core Ass'n, 120 F.Supp.2d 870, 876 (C.D. Cal. 2000). Plaintiffs now attempt to salvage their claims by submitting Daisley's declaration regarding the allegedly improper credits. Reconsideration is barred as a

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[5] In addition, defendants argue that the additional submission which includes Daisley's declaration (1) violates the Court's ruling that each side could file a single submission in support of its motion for reconsideration by, and (2) is untimely. Defendants' Opposition to Plaintiffs' Motion for Reconsideration, at 2.

[6] Plaintiffs maintain that copies of the Albums and the liner notes were attached as Exhibits B and C to plaintiffs' original complaint. Plaintiffs' Motion for Reconsideration at 3, fn. 5. Defendants dispute this assertion. Defendants' Opposition to Plaintiffs' Motion for Reconsideration at 1, fn. 1. ("Examination of the Court files confirms that neither the original nor amended complaints filed with the Court, nor the copies served on Defendants, attach exhibits. . . .") It does not appear that copies of the Albums were attached to the original complaint or filed with the court at any time during the pendency of this litigation. For that reason, the Court requested copies of the Albums prior to hearing the motion for summary judgment. However, the Court's examination of the Albums did not reveal any obviously improper credits. In addition, together with the Albums, plaintiffs submitted a copy of what appears to be the liner notes from "The Ozzman Cometh," with an unknown individual's handwritten notes. The Court does not consider this to be admissible evidence, especially where the notes are not submitted with any explanation as to what the purport to be.

matter of law where it is based on evidence previously available to plaintiffs but not brought to the attention of the Court. Frederick S. Wyle Professional Corp. v. Texaco, Inc., 764 F.2d 604, 609 (9th Cir. 1985). Therefore, plaintiffs' motion for reconsideration is denied.

## III. CONCLUSION

For the foregoing reasons, defendants' motion for reconsideration is GRANTED. The Court hereby vacates its June 4, 2002 Order denying defendants' motion as to plaintiffs' claim for open book account, and grants summary judgment for defendants on that claim. Plaintiffs' motion for reconsideration is DENIED. Except as provided to the contrary herein, the Court's June 4, 2002 order remains in effect.

IT IS SO ORDERED

Dated: this 16th day of August, 2002

"s/Christina A. Snyder"
CHRISTINA A. SNYDER
UNITED STATES DISTRICT JUDGE

ENTERED
CLERK U.S. DISTRICT COURT
AUG 19 2002
CENTRAL DISTRICT OF
CALIFORNIA
BY DEPUTY

FILED
CLERK U.S. DISTRICT COURT
AUG 16, 2002
CENTRAL DISTRICT OF
CALIFORNIA
BY DEPUTY

**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

**WESTERN DIVISION**

ROBERT DAISLEY and LEE KERSLAKE,

Plaintiffs,

vs.

OZZY OSBOURNE et al.,

Defendants.

Case No. CV 98-6954 CAS (SHx)

JUDGMENT

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

For the reasons set forth in the Court's Order dated June 4, 2002, the Court dismisses plaintiffs' sixth claim for relief for lack of subject matter jurisdiction. Pursuant to the Court's Orders dated June 4, 2002, and August 16, 2002, the Court grants judgment in favor of defendants and against plaintiffs on plaintiffs' first, second, third, fourth, fifth, and seventh claims for relief. Therefore, it is HEREBY ORDERED. ADJUDGED AND DECREED, that defendants

shall have judgment against plaintiffs, and that plaintiffs shall take nothing by their complaint. Each side shall bear its own attorneys' fees and costs.

IT IS SO ORDERED.

Dated: this 16th day of August, 2002

"s/Christina A. Snyder"
CHRISTINA A. SNYDER
UNITED STATES DISTRICT JUDGE

FILED
DEC 02 2003
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT DAISLEY; et al.,

Plaintiffs - Appellants,

v.

OZZY OSBOURNE; et al.,

Defendants - Appellees.

No. 02-56624

D.C. No. CV-98-06954-CAS

ORDER

Before: RYMER and TALLMAN, Circuit Judges, and LEIGHTON,* District Judge.

The panel has unanimously voted to deny the petition for rehearing and petition for rehearing en banc. Judges Rymer and Tallman voted to deny the petition for rehearing en banc and Judge Leighton so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and petition for rehearing en banc are DENIED.

* Honorable Ronald B. Leighton, United States District Judge for the Western District of Washington, sitting by designation.